82-1455

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LEONARD ELLISON,

Petitioner,

vs.

KANE COUNTY SHERIFF'S OFFICE MERIT COMMISSION, GENEVA, ILLINOIS, and GEORGE B. KRAMER, SHERIFF OF KANE COUNTY, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1. Must administrative remedies be exhausted if an Illinois Statute is sufficiently attacked on its face as to its constitutionality?

2. Does *Ill. Rev. Stat.*, Ch. 38, Sec. 24-3.1, Subsec. (a)(5), which provides that "A person commits the offense of unlawful possession of firearms or firearms ammunition when he has been a patient in a mental hospital within the past five years and has any firearms or firearms ammunition in his possession" violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution in that no hearing provision is provided to refute the irrebuttable presumption of mental unfitness thereby invoking judicial review?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions And Statutes Involved

In The

Supreme Court of the United States

October Term, 1982

LEONARD ELLISON,

Petitioner,

vs.

KANE COUNTY SHERIFF'S OFFICE MERIT COMMISSION, GENEVA, ILLINOIS, and GEORGE B. KRAMER, SHERIFF OF KANE COUNTY, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

OPINIONS BELOW

On October 14, 1981, the Honorable John A. Krause, of the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, entered a judgment sustaining the constitutionality of *Ill. Rev. Stat.*, Ch. 38, Sec. 24-3.1(a)(5) on the basis that it was a rational exercise of police power.

The aforesaid judgment was entered in connection with petitioner's complaint for declaratory judgment that alleged that Illinois Statutory Law in question denied the

petitioner due process and equal protection under the fifth and fourteenth amendments of the United States Constitution, since it does not provide for a hearing process to refute an irrebuttable presumption of mental unfitness relating to the confinement of persons in mental hospitals within a period of five years while in the possession of firearms or firearms ammunition thereby resulting in a criminal misdemeanor violation (the judgment of October 14, 1981, of the Honorable John A. Krause is reprinted herein as Appendix A).

From the aforementioned judgment, the petitioner appealed to the Appellate Court of Illinois, Second Judicial District.

On September 14, 1982, the Illinois Appellate Court of the Second Judicial District reversed the ruling of the Honorable John A. Krause on the legal theory that the petitioner did not exhaust his administrative remedies.

However, in a strongly worded dissent, the Honorable G. Reinhard of that Court stated that the petitioner had asserted a sufficient attack facially as to the constitutionality of the Statute to warrant judicial review without exhausting his administrative remedies (the opinion of the Appellate Court is reprinted herein as Appendix B).

From the decision of the Illinois Appellate Court, the petitioner filed a petition for leave to appeal to the Supreme Court of Illinois.

On November 30, 1982, the Illinois Supreme Court denied the petition for leave to appeal (the order of denial is reprinted herein as Appendix C).

JURISDICTION

1. The federal question was raised by the petitioner in his complaint for declaratory judgment filed in the Sixteenth Judicial Circuit, Kane County, Illinois, challenging the constitutionality of Illinois statutory law to which this petition for writ of certiorari pertains.

2. The petition for certiorari was filed within 90 days after the entry of the judgment by the Illinois Supreme Court on November 30, 1982.

CONSTITUTIONAL PROVISIONS

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

That the Petitioner was employed as a Deputy Sheriff of Kane County, Illinois.

That on June 23, 1980, at 3:30 p.m., the Petitioner had been admitted into a mental hospital, Mercy Center, located in Aurora, Illinois.

That, at the time the Petitioner was admitted into the mental hospital, Mercy Center, Aurora, Illinois, there was in effect an Illinois statute, *Ill. Rev. Stat.*, Ch. 38, Sec. 24-3.1(a)(5), entitled, "Unlawful Possession of Firearms and Firearms Ammunition," which provided as follows:

> "A person commits the offense of unlawful possession of firearms or firearms ammunition when he has been a patient in a mental hospital within the past five years and has any firearms or firearms ammunition in his possession."

That on August 25, 1980, the Petitioner had been psychiatrically evaluated pursuant to the direction of the Sheriff's Merit Commission of Kane County, Illinois, and had been pronounced fit for duty.

That on February 11, 1981, George B. Kramer, Sheriff of Kane County, Illinois, filed a Complaint with the Kane County Sheriff's Office Merit Commission alleging that

the institutionalization of the Petitioner at Mercy Center in Aurora, Illinois, on June 23, 1980, violated certain provisions of the personnel conduct standards of the Kane County Sheriff's Department, to wit:

> 7.32 "Engaging in conduct on or off duty which adversely affects the . . . efficiency of the Department. . . " .
>
> 7.39 "Lack of maintenance of good . . . mental condition which interfered with the proper handling of Departmental business."

That on February 25, 1981, the Petitioner filed a Complaint for Declaratory Judgment alleging that *Ill. Rev. Stat.*, Ch. 38, Sec. 24-3.1, Subsec. (a)(5), violated his rights under the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution in that it subjected him to disciplinary action possibly resulting in termination merely on the basis of being admitted into a mental hospital while in the possession of firearms or firearms ammunition.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER DOES NOT HAVE TO EXHAUST HIS ADMINISTRATIVE REMEDIES BECAUSE HE RAISED A SUFFICIENT FACIAL CHALLENGE TO THE CONSTITUTIONALITY OF *ILL. REV. STAT.*, CH. 38, SEC. 24-3.1, SUBSEC. (a)(5).

It is the Petitioner's contention that the constitutionality of *Ill. Rev. Stat.*, Ch. 38, Sec. 24-3.1, Subsec. (a)(5), must be judicially reviewed because it violates his due process and equal protection rights under the Fifth and Fourteenth Amendments of the United States Constitution.

In support of his position, the Petitioner cites the case of *Walker v. State Board of Elections*, 65 Ill. 2d 543 (1976), for the proposition that a party does not have to exhaust administrative remedies when challenging the constitutionality of a statute in certain situations pursuant to the following quotation from that decision:

> "We have recognized certain exceptions to the general rule that a party must exhaust administrative remedies before seeking judicial relief. One of those exceptions applies in this case. In *Bank of Lyons v. County of Cook*, 13 Ill. 2d 493, we considered the distinction between a statute invalid in its terms and a statute invalid only in its application. There we held that a party need not exhaust administrative remedies if the alleged infirmity is found in the terms of statute."

In this instance, in the Appellate Court, the Petitioner maintained that *Ill. Rev. Stat.*, Ch. 38, Sec. 24-3.1, Subsec. (a)(5), denied him due process and equal protection under the Fifth and Fourteenth Amendments of the

United States Constitution, thereby sufficiently attacking the Illinois Statute on its face as to its constitutionality.

II.

THAT *ILL. REV. STAT.*, CH. 38, SEC. 24-3.1, SUBSEC. (a)(5), VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

With reference to the due process consideration, the Petitioner argued that, since the criminal statute in question does not provide for a hearing to determine whether persons institutionalized in a mental hospital within a period of five years while in the possession of firearms or firearms ammunition were unfit, the statute in effect creates an irrebuttable presumption of unfitness.

In contrast, in *Rawlings v. Department of Law Enforcement*, 73 Ill. App. 3d 267 (1979), the Court dealt with the Firearms Act wherein there is a provision for a discretionary hearing for the purpose of rebutting the presumption of unfitness relating to the holding of a firearms owners identification card.

Since the same due process hearing consideration is not provided in the criminal statute to which this writ for certiorari relates and since police officers are not required to apply for a firearms owners identification card in order to qualify or continue in their employment as police officers pursuant to *Ill. Rev. Stat.*, Ch. 38, Sec. 83-2, Subsec. (b)(4), the criminal statute certainly denies the police officer a due process hearing to contest his fitness to carry firearms and firearms ammunition.

In addition, the Petitioner also contends that Ch. 38, Sec. 24-3.1, Subsec. (a)(5), of the *Illinois Revised Statutes*, had violated his equal protection rights under the

United States Constitution in that it punishes mental hospital patients confined within a period of five years while in the possession of firearms or firearms ammunition on the basis of an irrebuttable presumption of unfitness and differentiates such persons as the Petitioner from other mental hospital police officer patients who have been institutionalized in a mental hospital beyond a period of five years or who are outpatients under medical care without being so confined who possess firearms or firearms ammunition.

Because the Petitioner has raised due process and equal protection violations concerning the irrebuttable presumption of unfitness as it concerns *Ill. Rev. Stat.*, Ch. 38, Sec. 24-3.1, Subsec. (a)(5), he has raised a sufficient facial challenge to the constitutionality of that statute as is recognized by the dissenting opinion of the Honorable Philip G. Reinhard who states:

> "In the instant case, plaintiff's complaint for declaratory judgment alleged that section 24-3.1(a)(5) (Ill. Rev. Stat. 1979, ch. 38, par. 24-3.1(a)(5)) violated his rights both under the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. An attack on equal protection grounds may be a facial attack and as such fall within the above exception. (See *e.g. Director of the Department of Agricultural v. Carroll Feed Service, Inc.* (1980), 83 Ill. App. 3d 164, 403 N.E. 2d 762.) Plaintiff has raised the argument that the statute unconstitutionally differentiates between police officers confined in a mental hospital within the past five years and other police officers who have been a patient in a mental hospital beyond the five year period or who have been treated on an outpatient basis. Thus, there is a sufficient attack facially as to the constitutionality of the statute to warrant judicial review without requiring exhaustion of administrative remedies."

CONCLUSION

For the reasons given, this petition should be granted.

Respectfully submitted,

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioner

APPENDIX A

CIRCUIT COURT FOR THE 16TH JUDICIAL CIRCUIT

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

GEN. NO. 81 MR 33
NON-JURY

LEONARD ELLISON,

Plaintiff,

v.

KANE COUNTY SHERIFF'S OFFICE MERIT COMMISSION, and GEORGE B. KRAMER, SHERIFF,

Defendant(s).

This case coming on for arguments on plaintiff's Complaint for Declaratory Judgment and on all parties' cross motions for summary judgment, the court, having examined the pleadings, motions and briefs, having heard arguments of counsel, and being fully advised in the premises, hereby finds:

(1) Ill. Rev. Stat. Ch. 38, Sec. 24-3.1(a)(5) does apply to deputy sheriffs such as plaintiff herein; and,
(2) Said statute is a rational exercise of the police power.

Therefore, Judgment is hereby entered for the defendants and against plaintiff.

ENTER: /s/ JOHN A. KRAUSE
Judge

Date: Oct. 14, 1981

APPENDIX B

[Filed — Sep 14 1982]

No. 81-885

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LEONARD ELLISON,

Plaintiff-Appellant,

v.

KANE COUNTY SHERIFF'S OFFICE MERIT COMMISSION, GENEVA, ILLINOIS, and GEORGE B. KRAMER, SHERIFF OF KANE COUNTY, ILLINOIS,

Defendants-Appellees.

Appeal from the Circuit Court for the
Sixteenth Judicial Circuit, Kane County, Illinois.

MR. JUSTICE HOPF delivered the opinion of the court:

The plaintiff, Leonard Ellison, appeals from an order of the trial court which denied his request for declaratory judgment (Ill. Rev. Stat. 1979, ch. 110, par. 57.1), and entered summary judgment for the defendants, the Kane County Sheriff's Office Merit Commission and George Kramer, sheriff of Kane County. The plaintiff's twofold contention on appeal is that section 24-3.1(a)(5) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 24-3.1(a)(5)), violates the due process and equal

protection clauses of the United States Constitution (U.S. Const., amends. V, XIV), and that the trial court erred in concluding otherwise.

Plaintiff, a deputy sheriff in Kane County, voluntarily committed himself to a mental hospital for two days in June 1980. After treatment as an outpatient, and an eight-week leave of absence, a psychiatric report concluded that plaintiff could return to duty.

Kane County sheriff Kramer filed a complaint against plaintiff with the merit commission. After referring to his two-day hospitalization, the complaint quoted section 24-3.1(a)(5) of the Criminal Code, which provides:

> "(a) A person commits the offense of unlawful possession of firearms or firearm ammunition when:
>
> * * *
>
> (5) He has been a patient in a mental hospital within the past 5 years and has any firearms or firearm ammunition in his possession * * * ." (Ill. Rev. Stat. 1979, ch. 38, par. 24-3.1(a)(5).)

The complaint further alleged that because he was a patient in a mental institution within the past five years, the plaintiff violated two rules of the personal conduct standards of the sheriff's department, *viz*: (1) Rule 7.32; "Engaging in conduct on or off duty which adversely affects the * * * efficiency of the Department * * * "; and (2) Rule 7.39; "Lack of maintenance of good * * * mental condition which interfered with the proper handling of Department business." The sheriff prayed that the commission commence a hearing on the charges.

Plaintiff then instituted a declaratory judgment action alleging that section 24-3.1(a)(5) violated the due process and equal protection clauses of the United States Constitution. He also requested that the court grant a tempo-

rary restraining order as well as preliminary and permanent injunctions to enjoin defendants from conducting a disciplinary hearing relating to the violation of section 24-3.1(a)(5). The parties then filed cross-motions for summary judgment, including affidavits in support thereof, and trial briefs.

The parties agreed, in response to the trial court's inquiry whether plaintiff had exhausted his administrative remedies, that they would seek a declaratory judgment prior to the hearing before the merit commission.

The court, in ruling on the cross-motions for summary judgment and complaint for declaratory judgment, found (1) that section 24-3.1(a)(5), of the Criminal Code did apply to the plaintiff, and (2) that the statutory provision in question was a rational exercise of the police power and hence constitutional. Plaintiff appeals.

Prior to addressing the contentions raised by the plaintiff a threshold question must be considered: could the trial court have dismissed plaintiff's complaint where plaintiff had yet to exhaust his administrative remedies?

Although the parties to this declaratory judgment action agreed that their claims should be brought before the circuit court prior to proceeding with the statutorily-required administrative hearing before the Kane County merit commission (Ill. Rev. Stat. 1980 Supp., ch. 125, par. 164), we are of the opinion that plaintiff failed to exhaust his administrative remedies and that they cannot stipulate this requirement away.

The general, well-settled law in this state is that where administrative remedies are available, they must be exhausted before resort may be had to judicial review in the circuit court. (*Illinois Bell Telephone Co. v. Allphin* (1975), 60 Ill. 2d 350, 358; 326 N.E.2d 737; *Dock*

Club, Inc. v. Illinois Liquor Control Com. (1980), 83 Ill. App. 3d 1034, 1037, 404 N.E.2d 1050.) However, the doctrine of exhaustion of remedies does not apply in situations where it would be futile to proceed initially via administrative channels. The fact that there are clear indications that the administrative agency will rule adversely is generally insufficient to abort the administrative process. (83 Ill. App. 3d 1034, 1037.) A possibility exists that upon remand the determination of the commission would be largely perfunctory and not based upon any particular expertise. (*Saldana v. American Mutual Corp.* (1981), 97 Ill. App. 3d 334, 337, 422 N.E.2d 860.) Nonetheless we choose not to anticipate the actions the commission may take. Further, orderly procedure dictates resort to the administrative agency first. *Bank of Lyons v. Cook* (1958), 13 Ill.2d 493, 497, 150 N.E.2d 97.

While there are broad statements in the cases that a declaratory judgment action can be maintained without first seeking prior relief before the administrative agency when the validity of a statute or municipal ordinance is challenged on its face (see, *e.g., Illinois Bell; Cushing v. Pitman* (1978), 56 Ill. App. 3d 930, 932, 372 N.E.2d 930; *Broccolo v. Village of Skokie* (1972), 14 Ill. App. 3d 27, 31, 302 N.E.2d 74), that rule does not apply in circumstances where charges are already pending against the plaintiff in an administrative disciplinary proceeding (see *Buege v. Lee* (1978), 56 Ill. App. 3d 793, 798, 372 N.E.2d 427; *Eckells v. City Council of East St. Louis* (1960), 23 Ill. App. 2d 360, 363, 163 N.E.2d 107), or where the issue of the validity of the ordinance sought to be determined in the action for declaratory judgment is currently pending before the administrative agency. (*Coles-Moultrie Electric Cooperative v. City of Charleston* (1972), 8 Ill. App. 3d 441, 444, 289 N.E.2d 441.) Nor

is the exception applicable where the statute is challenged for its unconstitutionality, not on its face, but as it is applied. *People ex rel. Kreda v. Fitzgerald* (1975), 33 Ill. App. 3d 209, 213, 337 N.E.2d 44.

In the present case, the sheriff initiated or filed charges against Deputy Ellison with the merit commission, although there is no evidence in the record that a date for a hearing was set. It should be noted, however, that counsel for the sheriff stated during oral argument before the trial court that he had been ready to proceed before the commission when he agreed to postpone the administrative proceedings to allow the plaintiff to bring the current action. It is also undisputed that the parties, by agreement, decided that the hearing before the merit commission should be held in abeyance until the trial court had entered an order declaring whether section 24-3.1(a)(5) was constitutional or unconstitutional. The fair inference to be drawn from the statements which the parties articulated at the hearing before the court below is that the administrative hearing would be commenced before the commission after the court's ruling and that the court's interpretation of the statute would be used to guide the commission.

An analogous situation was presented to the court in *Eckells*. In that case charges were filed against the plaintiffs, and the hearings on those charges were set but not commenced. There the court of review reversed the trial court's granting of the declaratory judgment construing certain statutes and ordinances and directed that the plaintiffs' cause of action be dismissed for failure to exhaust their administrative remedies. On that occasion the court stated:

> "When a matter is pending before an administrative body which is properly acting under a statu-

> tory grant of power, declaratory judgment proceedings cannot be commenced subsequently in the circuit court to obtain findings and opinions to affect, control or guide the outcome of the proceeding before the administrative body." *Eckells*, 23 Ill. App. 2d 360, 363.

In *Coles-Moutrie Electric Cooperative v. City of Charleston* (1972), 8 Ill. App. 3d 441, 289 N.E.2d 491, the plaintiff sought a declaratory judgment construing a municipal ordinance. The question of the validity of that ordinance was then pending before an administrative body. In upholding the trial court's decision to dismiss the complaint for declaratory judgment, the appellate court pointed out that even if the administrative body did not have authority to pass upon the validity of the ordinance, the plaintiff could later seek a determination of the ordinance's validity upon administrative review of the agency's decision. Thus, under the authority of *Coles-Moultrie*, the merit commission's contention below, that the trial court was the only forum available to determine the constitutionality of the statute and thus the declaratory judgment action should proceed first, lacks merit.

In light of the holdings and rationale of *Coles-Moultrie* and *Eckells*, we believe that the trial court's order awarding judgment against the plaintiff and for the defendants must be vacated and the cause remanded with directions that the complaint be dismissed, because the plaintiff has not exhausted his administrative remedies.

The parties may then proceed before the merit commission. After the commission has rendered its decision, the circuit court can, if requested, review that decision.

Because of our finding that the plaintiff must exhaust his administrative remedies we do not reach the merits of the plaintiff's claims. Accordingly, the judgment of the trial court is vacated and this cause is remanded with instructions that an order be entered dismissing the plaintiff's complaint for declaratory judgment and injunctive relief.

VACATED and REMANDED, with instructions.

NASH, J., concurs.

JUSTICE REINHARD dissenting:

The doctrine of exhaustion of administrative remedies is a rule which requires that a party aggrieved by administrative action ordinarily cannot seek judicial review in the courts without pursuing all administrative remedies available to him. (*Illinois Bell Telephone Co. v. Allphin* (1975), 60 Ill. 2d 350, 357-58, 326 N.E.2d 737.) An exception to this general rule is that a party need not exhaust administrative remedies if the alleged constitutional infirmity is found in the terms of a statute. (*Walker v. State Board of Elections* (1976), 65 Ill. 2d 543, 552, 359 N.E.2d 113.) However, if the statute is valid on its face but is applied in a discriminatory or arbitrary manner, the challenging party must pursue administrative remedies before seeking judicial relief. (65 Ill. 2d 543, 522). Also, in order to come within this exception, a plaintiff must point to language in the statute which, without more, reasonably can be said to violate a specific constitutional guarantee. *Northwestern University v. City of Evanston* (1978), 74 Ill. 2d 80, 87, 383 N.E.2d 964.

In the instant case, plaintiff's complaint for declaratory judgment alleged that section 24-3.1(a)(5) (Ill. Rev. Stat. 1979, ch. 38, par. 24-3.1(a)(5)) violated his rights both under the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. An attack on equal protection grounds may be a facial attack and as such fall within the above exception. (See *e.g. Director of the Department of Agriculture v. Carroll Feed Service, Inc.* (1980), 83 Ill. App. 3d 164, 403 N.E.2d 762.) Plaintiff has raised the argument that the statute unconstitutionally differentiates between police officers confined in a mental hospital within the past five years and other police officers who have been a patient in a mental hospital beyond the five year period or who have been treated on an outpatient basis. Thus, there is a sufficient attack facially as to the constitutionality of the statute to warrant judicial review without requiring exhaustion of administrative remedies.

The substance of plaintiff's due process argument is that the statute making it a criminal offense to possess a firearm if the person has been a patient in a mental hospital within the past five years does not provide for a discretionary administrative hearing to rebut the presumption of unfitness which the appellate court in *Rawlings v. Department of Law Enforcement* (1979), 73 Ill. App. 3d 267, 391 N.E.2d 758, held was present under sections of "An Act relating to acquisition, possession and transfer of firearms * * * " (Ill. Rev. Stat. 1979, ch. 38, par. 83-1 *et seq.*) for persons making application for a firearm owner's identification card. In my opinion, the challenge here brings into question the constitutionality of the statute beyond its application to the specific facts of this case but as applied to all law enforcement officers. There is no question of fact which requires the

administrative agency's expertise for determination nor does the majority opinion indicate what factual question requires the administrative agency's review. The issue presented is one of statutory interpretation.

The majority opinion relies on *Eckells v. City Council of East St. Louis* (1960), 23 Ill. App. 2d 360, 163 N.E.2d 107, for the proposition that where charges are already pending against the plaintiff in an administrative disciplinary hearing one cannot proceed into court to challenge even facially the validity of a statute or ordinance. I think that the holding in *Eckells* has long since ceased to be the law. (See *e.g. Walker v. State Board of Elections* (1976), 65 Ill. 2d 543, 359 N.E.2d 113; *City of Chicago v. Pollution Control Board* (1975), 59 Ill. 2d 484, 322 N.E.2d 11; *Board of Education of Hawthorne School District No. 17, Marengo v. Eckmann* (1982), 103 Ill. App. 3d 1127, 432 N.E.2d 298.) Moreover, *Coles-Moultrie Electric Cooperative v. City of Charleston* (1972), 8 Ill. App. 3d 441, 289 N.E.2d 491, also relied upon by the majority is not pertinent authority on the issue raised here. In *Coles-Moultrie*, the appellate court found no abuse of discretion in the trial court's dismissal of a complaint seeking a declaratory judgment where the issue sought to be decided was pending before the Illinois Commerce Commission. The decision was not based upon exhaustion of administrative remedies doctrine, but upon the trial court's exercise of discretion in declining to grant declaratory relief. For these reasons I would review the constitutional issues raised before this court by the plaintiff.

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

November 30, 1982

Mr. Stanley H. Jakala
Attorney at Law
3219 Maple Ave.
Berwyn, IL 60402

No. 57447—Leonard Ellison, petitioner, vs. Kane County Sheriff's Office Merit Commission, Geneva, Illinois, et al., respondents. Leave to appeal, Appellate Court, Second District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ JULEANN HORNYAK
Clerk of the Supreme Court

NO. 82 - 1455

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

LEONARD ELLISON,

Petitioner,

vs.

KANE COUNTY SHERIFF S OFFICE MERIT COMMISSION
GENEVA, ILLINOIS, and GEORGE B. KRAMER
SHERIFF OF KANE COUNTY, ILLINOIS,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

DAVID R. AKEMANN
Counsel of Record
and
LINDA SOREFF SIEGEL
719 Batavia Avenue
Geneva, Illinois, 60134
(312) 232-2400, Ext. 560

Attorneys for Respondent
Kane County Sheriff's Office
Merit Commission,
Geneva, Illinois

ROBERT J. MORROW
STATE'S ATTORNEY
OF KANE COUNTY

DAVID R. AKEMANN
CHIEF: CIVIL DIVISION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions And Statutes Involved

STATEMENT OF THE CASE

At all relevant times, the Petitioner was a Deputy Sheriff of Kane County, Illinois, subject to discipline of the Respondents by virtue of the laws of the State of Illinois and The County of Kane, a political subdivision thereof.

On June 23, 1980, the Petitioner was admitted into a mental hospital located in Aurora, Illinois. At the same time, there was in effect an Illinois statute, ILL. REV. STAT., Ch. 38, Sec. 24-3.1(a) (5), entitled, "Unlawful Possession of Firearms and Firearms Ammunition," which provided as follows:

> "A person commits the offense of unlawful possession of firearms or firearms ammunition when he has been a patient in a mental hospital within the past five years and has any firearms or firearms ammunition in his possession."
>
> (hereinafter referred to as the Unlawful Possession Statute).

On or about July 16, 1980, Petitioner executed a sworn application to renew a Fire-

arms Owners' Identification Card. The application contained the following question, "Have you been a patient in a mental hospital within the past 5 years?" The Petitioner answered that question in the negative.

On Febraury 11, 1981, Respondent Sheriff filed a Complaint with the Respondent Merit Commission seeking disciplinary action against the Petitioner. The basis of the Complaint was that Petitioner, by virtue of the unlawful possession statute, could not lawfully carry a firearm and that possession of a firearm was necessary to perform the duties of Deputy Sheriff (hereinafter referred to as Complaint No. 1).

On February 25, 1981, Petitioner filed a Complaint for Declaratory Judgment in the circuit court alleging that the unlawful possession statute was unconstitutional on its face and as applied to Petitioner because it violated the due process and equal protection clauses of the Fifth and Fourteenth Amendemnts of the United States Constitution.

On February 25, 1981, petitioner and both Respondents agreed to postpone the hearing on the merits of Respondent Sheriff's Complaint before the Respondent Merit Commission, until the adjudication of Petitioner's Complaint in the circuit court.

On April 2, 1981, at a pre-hearing conference in the circuit court, all parties agreed that the case would be limited to a facial challenge to the unlawful possession statute and that it would not include a challenge to said statute in its application to Petitioner.

On August 21, 1981, Respondent Sheriff filed another Complaint against Petitioner with Respondent Merit Commission seeking disciplinary action. The basis of this Complaint was that on or about July 16,1980, Petitioner lied on an application to renew his Firearms Owners' Identification Card which had been previously issued to him by the State of Illinois (hereinafter referred to as Complaint No. 2).

On October 14, 1981, the circuit court entered judgment in favor of the Respondents and against Petitioner in the declaratory judgment action upholding the constitutionality of the unlawful possession statute.

On November 12, 1981, Respondent Merit Commission held consolidated hearings on both Complaints 1 and 2.

On December 9, 1981, Respondent Merit Commission found Petitioner guilty on both Complaints and ordered that Petitioner be discharged.

On January 12, 1982, Petitioner filed a Complaint for Administrative Review of Respondent Merit Commission's decision which is still pending in the state circuit court.

On September 14, 1982, the Appellate Court of Illinois, Second District, on a 2-1 decision, reversed the circuit court. The Appellate court did not reach the merits of Petitioner's constitutional claims, but instead remanded the case to the trial court with instructions to dismiss for failure to exhaust

his administrative remedies. Apparently, the Appellate Court was not aware that by the date of its Opinion, Petitioner had already exhausted his administrative remedies.

On November 30, 1982, the Supreme Court of Illinois denied leave to appeal the Appellate Court's decision and on March 1,1983, Petitioner filed a petition for a Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

A Writ of Certiorari should not be granted because no state appellate court has ever decided the merits of the issue Petitioner seeks to raise in this Court. Also,Petitioner still has a state forum to raise his constitutional claims.

In addition, a decision of the issue sought to be raised in this court will not dispose of the controversy between the parties. Petitioner was found guilty on two separate and separately supported Complaints. Only one of these Complaints involves a federal constitutional question.

I.

PETITIONER DOES NOT PRESENT ANY CONSIDERATIONS SET FORTH IN RULE 17 (b)

A.

A State Court Of Last Resort Has Not Decided A Federal Question In This Case.

In the instant case, the state appellate court remanded the case to the circuit court with instructions to dismiss without rendering a decision on Petitioner's federal issues. This remand was founded upon state, not federal legal principles. However, a state forum remains that will allow petitioner to raise the federal questions in the proper forum.

Petitioner has raised the identical federal questions in his hearing before the Respondent Merit Commission. Petitioner has filed a Complaint for administrative review of that decision. If that Complaint is prosecuted, a state court of last resort will then have a proper forum to decide the federal questions, petitioner seeks to raise here.

B

The Application Of State Law May Obviate The Need To Reach The Federal Constitutional Question Involved Here.

Petitioner now seeks to have this court decide federal constitutional issues based on a facial challenge to an Illinois criminal statute. However, in Rawlings v. Department of Law Enforcement, 73 Ill. App. 3d 267(1979), the state appellate court indicates, at least in dicta, that a proper hearing procedure under the Firearms and Ammunition Act, ILL. REV. STAT., Ch. 38, Sec. 83-1 et seq. et. seq. may remove an individual from the effect of the criminal unlawful possession statute. Rawlings at 276.

Petitioner, therefore, may have other administrative remedies to pursue that do not involve any of the Respondents.

C

Petitioner Lacks Federal Authority To Support His Petition.

Petitioner cites the case of Walker v. State Board of Elections, 65 Ill. 2d 543(1976) in support of his petition. However, Walker was an election case decided on state law. The same argument was rejected by the majority in the state appellate court below. (Petition, Appendix B) Petitioner does not cite a single federal case or statute which necessitates this court ignoring the reasonable Illinois procedural rule on exhaustion of administrative remedies.

II.

A DECISION ON THE MERITS WILL NOT TERMINATE THE CONTROVERSY BETWEEN THE PARTIES

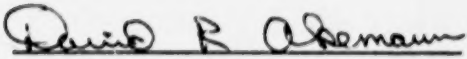
Petitioner was found guilty on two separate Complaints. Only one of the Complaints relates to the federal questions presented in the petition. At best, Petitioner may receive a declaration of facial invalidity of the unlawful possession statute. Such a decision, if indeed, would not effect the second Complaint on which petitioner was also found guilty.

Accordingly, Petitioner's federal constitutional claims are not appropriate to be settled by this court in this posture within the meaning and spirit of Rule 17(c) of this court.

CONCLUSION

For the preceding reasons this petition should not be granted.

Respectfully submitted



DAVID R. AKEMANN
719 Batavia Ave.
Geneva, Illinois 60134
(312)232-2400, Ext 560

Attorney for Respondent
Kane County Sheriff's Office
Merit Commission,
Geneva, Illinois.

No. 82-1455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LEONARD ELLISON,

Petitioner,

vs.

KANE COUNTY SHERIFF'S OFFICE MERIT COMMISSION, GENEVA, ILLINOIS, and GEORGE B. KRAMER, SHERIFF OF KANE COUNTY, ILLINOIS,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Rules

In The

Supreme Court of the United States

October Term, 1982

LEONARD ELLISON,

Petitioner,

vs.

KANE COUNTY SHERIFF'S OFFICE MERIT COMMISSION, GENEVA, ILLINOIS, and GEORGE B. KRAMER, SHERIFF OF KANE COUNTY, ILLINOIS,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Analyzing the response to the petitioner's writ of certiorari, the respondents stress in their statement of facts, that, while the Illinois Appellate Court was remanding the matter for petitioner's failure to exhaust his administrative remedies, in fact, the petitioner had already exhausted his administrative remedies by filing a complaint for administrative review from an administrative agency's decision discharging the plaintiff from his employment.

With the above statement of fact the petitioner acknowledges that he had raised the federal issues in the administrative hearing which he has appealed via a complaint for administrative review.

But, in rebuttal, the petitioner disagrees with the respondents' position that the raising of those issues at the administrative hearing which federal issues are included in the complaint for administrative review should be a bar to the writ of certiorari.

The significance of the writ of certiorari, in this instance, is that it concerns an issue of statutory interpretation.

By its decision the Illinois Appellate Court fortified by the Illinois Supreme Court's denial of a petition for appeal has determined that constitutional interpretation of the Illinois statute in question cannot be subjected to judicial review unless there is an exhaustion of administrative remedies.

Thus the decision of the Illinois Appellate Court in conjunction with the Illinois Supreme Court's denial of the petition for leave to appeal subjects persons, such as the petitioner, to administrative hearings postured upon unconstitutional grounds.

Consequently, under United States Supreme Court Rule 17(a), the Illinois Supreme Court, in this instance, has ruled that unconstitutional statutes can be grounds for dismissal prior to exhaustion of administrative remedies.

Such a ruling is a violation of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution as analyzed by the dissenting opinion of the Illinois Appellate Court as found in the writ of certiorari.

Furthermore, the Illinois Firearms and Ammunition Act which provides for a discretionary hearing cannot be dispositive of the matter, since the writ of certiorari deals with an Illinois criminal statute that does not provide for any hearing provision.

Because of the Illinois criminal statute to which the writ of certiorari relates, the petitioner is unable to refute the irrebuttable presumption of unfitness to carry firearms or firearms ammunition on the basis of being admitted into a mental hospital while in the possession of firearms or firearms ammunition within five years thereby denying him the opportunity to continue in his police employment.

At the same time, the petitioner is not required to exhaust his administrative remedies to pursue an attack upon constitutional grounds of a statute. *Monroe v. Pape*, 365 U.S. 167 (1961); *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Begg v. G. Joe Moffitt, et al.*, 555 F. Supp. 1344 (1983).

Lastly the decision on the merits, in this instance, will terminate the controversy in that petitioner in the appeal process of his discharge will be confronted with either two issues or one.

If the Illinois criminal statute, in this instance, is determined to be unconstitutional, then his appeal will only be burdened with the complaint based upon his alleged fraud in connection with an Illinois Firearms Act application.

By disposing of the unconstitutional considerations of the Illinois statute, the United States Supreme Court will be complying with its Rule 17(c), since its decision on this question will be relevant not only to the petitioner, but to all Illinois Police Officers and all other United States

Police Officers who may be subjected to such similar statutes.

CONCLUSION

For reasons enumerated, herein, petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733

Attorney for Petitioner